

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)	
)	
Petition of AT&T Inc. For Forbearance)	WC Docket No. 07-21
Under 47 U.S.C. § 160 From Enforcement)	
Of Certain of the Commission's Cost)	
Assignment Rules)	
)	
Petition of BellSouth Telecommunications,)	WC Docket No. 05-342
Inc. For Forbearance Under 47 U.S.C. § 160)	
From Enforcement of Certain of the)	
Commission's Cost Assignment Rules)	

REPLY COMMENTS

Sprint Nextel Corporation, COMPTTEL, Integra Telecom, Inc., and tw telecom inc. (together "Commenters") pursuant to the Commission's Public Notice released on June 6, 2008 (DA 08-1361), submit the following reply comments regarding the May 23, 2008 *ex parte* request of Verizon and Qwest to receive the same relief that the Federal Communications Commission ("Commission") granted AT&T in the above-referenced proceeding ("*Verizon/Qwest Ex Parte*").¹ Specifically, the Commenters oppose the request Embarq made in its Comments that the Commission extend AT&T's cost assignment forbearance relief not only to Verizon and Qwest, but also to Embarq and all other federal price cap incumbent local exchange carriers ("ILECs"). Embarq's request is flawed in form and substance, fails to

¹ *Petition of AT&T Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement Of Certain of the Commission's Cost Assignment Rules and Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission's Cost Assignment Rules*, WC Docket Nos. 07-21 and 05-342, Memorandum Opinion and Order, 23 FCC Rcd 7302 (2008) (*AT&T Order*), *pet. for recon pending*. The statutory provisions, Commission rules, and related reporting requirements from which AT&T obtained forbearance collectively will be referred to herein as the "Cost Assignment Rules." The data the Cost Assignment Rules generate will be referred to herein as "cost assignment data."

establish that Embarq is similarly situated with AT&T, and its grant would only exacerbate the multiple problems associated with the *AT&T Order*.

I. Embarq's Request is Flawed Procedurally and Substantively.

Like the *Verizon/Qwest Ex Parte* request, Embarq's request is flawed as a petition for forbearance in both form and substance. In terms of form, the request does not satisfy the requirements under Section 1.53 of the Commission's rules that a petition for forbearance be "filed as a separate pleading" and "identified in the caption of such pleading as a petition for forbearance under 47 U.S.C. § 160(c)."² Embarq simply mentioned its request within its "Comments of Embarq" regarding the *Verizon/Qwest Ex Parte* request for AT&T cost assignment forbearance in WC Docket No. 07-21.³ Embarq's request was neither filed as a separate pleading, nor captioned to identify it as a "petition for forbearance under 47 U.S.C. § 160(c)" as Section 1.53 expressly requires, and therefore fails to qualify as a valid petition for forbearance. Accordingly, the Commission has no obligation to consider the Embarq's request at all, let alone under the substantive standards and statutory deadline under Section 10 of the Communications Act of 1934, as amended ("Act").⁴

In terms of substance, the Commission must find that the three-prong forbearance standard under Section 10 of the Act is satisfied before it may grant forbearance.⁵ Embarq's request, however, provided absolutely no analysis of how it has fulfilled this statutory requirement. It merely stated that the Commission found that AT&T satisfied Section 10 in the *AT&T Order*, and that Embarq is entitled to the same relief since it is also a federal price cap

² 47 C.F.R. § 1.53.

³ Embarq Comments at 6.

⁴ 47 U.S.C. § 160.

⁵ See 47 U.S.C. § 160(a).

carrier and could file a compliance plan.⁶ Such conclusory statements do not amount to a rigorous forbearance analysis.

Moreover, the Commission cannot apply the assertions made in the *Embarq ARMIS Petition* to this request.⁷ The *Embarq ARMIS Petition* requested forbearance from only two ARMIS reports – 43-05 (Service Quality) and 43-08 (Operating Data).⁸ AT&T, however, received forbearance from the Cost Assignment Rules, which encompass a broad range of rules, regulations and related reporting requirements. As the Commission has acknowledged, “*it would raise difficult questions* if a forbearance petitioner’s subsequent submissions could enlarge the scope of its initial section 10 forbearance petition”⁹ In this case, given that there is no overlap between the forbearance relief requested in the *Embarq ARMIS Petition* and the cost assignment forbearance relief AT&T received in the *AT&T Order*, Embarq’s request is more than a significant enlargement of the original relief requested – it is an entirely new request. Embarq, however, provides no Section 10 analysis to support this new request. Accordingly, the Commission must reject Embarq’s request as both procedurally and substantively deficient.

⁶ Embarq Comments at 3, 5-6.

⁷ *Petition of Embarq Local Operating Companies for Forbearance from Enforcement of the Commission’s ARMIS Reporting Requirements Pursuant to 47 U.S.C. § 160(c)*, WC Docket No. 07-204 (filed October 19, 2007) (*Embarq ARMIS Petition*).

⁸ See *id.*

⁹ See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, 22 FCC Rcd 16304, ¶ 24, n.71 (emphasis added).

II. Embarq is Not Similarly Situated with AT&T.

Embarq also is not entitled to the identical forbearance relief AT&T received because it is not similarly situated with respect to AT&T. As Embarq itself acknowledges, “Embarq is a small fraction of AT&T’s size . . . is not an integrated carrier, . . . [and] is chiefly rural.”¹⁰ Given these differences and others, Embarq is not regulated in the same way that AT&T is regulated under the Cost Assignment Rules. Indeed, Embarq’s Cost Assignment Rule compliance burden is in fact lighter than AT&T’s. For example, as a mid-sized ILEC as defined in Section 32.9000 of the Commission’s rules, Embarq is required only to file an annual certification that it is complying with the Part 64 rules, rather than having to file a biannual compliance review by an outside auditor as AT&T is required to do. In addition, its status as a mid-sized ILEC means that Embarq does not file the entire set of ARMIS reports that AT&T does. Instead, Embarq is required to file only the ARMIS 43-01, 43-05 and 43-08 reports. Given these significant differences, the Commission would have an obligation to initiate a separate *de novo* review of Embarq’s request to weigh Embarq’s lighter compliance burden against the benefits of obtaining cost assignment data from Embarq.

In addition, unlike AT&T, which is not subject to rate-of-return regulation in any state, Embarq is subject to rate-of-return regulation at the state level in New Jersey and Oregon. As discussed in earlier comments, the Commission must closely consider the impact of state rate-of-return regulation on the federal separations process.¹¹ Furthermore, unlike AT&T, several of Embarq’s affiliates receive federal universal service high cost loop support.¹² Therefore, in the

¹⁰ See Embarq Comments at 6.

¹¹ See Comments of Sprint Nextel Corporation, COMPTel, One Communications Corp., T-Mobile USA, Inc., and Time Warner Telecom Inc. at 9-10.

¹² See *Universal Service Monitoring Report*, CC Docket No. 98-202 (2007), prepared by Federal and State Staff for the Federal-State Joint Board on Universal Service in CC Docket No. 96-45.

case of Embarq, the Cost Assignment Rules are needed to help calculate the appropriate level of high cost loop support its affiliates should receive.

Embarq's case aptly demonstrates that the Commission cannot assume that all federal price cap ILECs are similarly situated with AT&T for purposes of the Cost Assignment Rules. The Commission must conduct a separate analysis of each carrier's unique circumstances before deciding to grant any degree of forbearance, let alone the identical cost assignment forbearance relief that AT&T received.

III. Grant of Embarq's Request Would Exacerbate the Problems Described in the *Petition for Reconsideration of the AT&T Order* and Result in Additional APA Violations.

Granting Embarq's request would only make a bad situation worse. Extending the application of the flawed *AT&T Order* to Embarq and other federal price cap ILECs would exacerbate the many issues raised in the *Petition for Reconsideration of the AT&T Order* with respect to the *Section 272 Sunset Order*, price cap regulation, Section 254(k) of the Act, and the AT&T compliance plan approach, as discussed in prior comments.¹³ In addition, the public interest would be better served if the Commission reviewed and resolved the issues the *Petition for Reconsideration* raised before extending the *AT&T Order*'s application to Embarq and other federal price cap ILECs.¹⁴ In any event, it would be inappropriate for the Commission to consider extending the forbearance granted under the *AT&T Order* to other carriers while the

¹³ See Comments of Sprint Nextel Corporation, COMPTel, One Communications Corp., T-Mobile USA, Inc., and Time Warner Telecom Inc. at 12-17; see also *Petition of Reconsideration of Sprint Nextel Corporation et al.*, WC Docket Nos. 07-21 and 05-342 (filed May, 27, 2008) (*Petition for Reconsideration*).

¹⁴ See Comments of Sprint Nextel Corporation, COMPTel, One Communications Corp., T-Mobile USA, Inc., and Time Warner Telecom Inc. at 11-12.

appeal of that order filed by the National Association of State Utility Consumer Advocates (“NASUCA”) is pending before the United States Court of Appeals for the D.C. Circuit.¹⁵

Granting Embarq’s request not only would exacerbate the issues raised in the *Petition for Reconsideration*, but also would create new ones in the form of additional violations of the Administrative Procedure Act (“APA”).¹⁶ In the *AT&T Order*, the Commission did not just grant AT&T forbearance. It conditioned its grant on AT&T filing a compliance plan, which essentially creates a new framework for AT&T to maintain and provide cost assignment data to the Commission upon request. If the Commission extends the compliance plan approach to Embarq and other federal price cap ILECs, it would effectively create new cost assignment rules. The Commission, however, can only forge new rules according to the procedural requirements of the APA. The APA requires the Commission to provide notice of proposed rules as well as an opportunity for interested parties to comment on those proposed rules.¹⁷ Accordingly, if the Commission extends the *AT&T Order* to Embarq and other federal price cap ILECs, but fails to provide interested parties the requisite notice of and opportunity to comment on the new compliance plan framework, it will violate the APA’s mandate.¹⁸

IV. Conclusion

The Commission must reject Embarq’s request to receive the identical Cost Assignment Rule forbearance relief AT&T received in the *AT&T Order*. Embarq’s request fails to meet both the procedural and substantive forbearance petition requirements and fails to demonstrate that it is similarly situated with AT&T. Indeed, grant of Embarq’s request would exacerbate the *AT&T*

¹⁵ *National Association of State Utility Consumer Advocates v. FCC*, D.C. Cir. Case No. 08-1226 (filed June 23, 2008).

¹⁶ 5 U.S.C. §§ 551 *et seq.*

¹⁷ *See* 5 U.S.C. § 553(b)-(c).

¹⁸ In any event, the FCC’s failure to put any cost assignment compliance plan on public notice for comment would violate the APA.

Order's significant problems and result in new APA violations. Accordingly, the Commission has no choice but to deny Embarq's request.

Respectfully submitted,

/s/ Anna M. Gomez

Anna M. Gomez
Maria L. Cattafesta
SPRINT NEXTEL CORPORATION
2001 Edmund Halley Drive
Reston, VA 20191
(703) 592-5115

/s/ Karen Reidy

Karen Reidy
Vice President, Regulatory Affairs
COMPTTEL
900 17th Street, N.W., Suite 400
Washington, D.C. 20006
(202) 296-6650

/s/ Russell C. Merbeth

Russell C. Merbeth
Assistant General Counsel
INTEGRA TELECOM, INC.
3213 Duke Street, Suite 246
Alexandria, VA 22314
(703) 599-0455

/s/ Thomas Jones

Thomas Jones
Jonathan Lechter
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TW
TELECOM INC.

Dated: July 7, 2008